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IN THE
Supreme Court of the United States

JOSEPHUS WELLS, *Appellant*,
vs.
DANIEL C. ROPER, *Appellee.*

October Term, 1917
No. 103.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT.

The case is here on appeal from a judgment of the Court of Appeals of the District of Columbia, which affirmed a judgment of the Supreme Court of the District of Columbia, dismissing the bill of the Appellant Wells, upon a Motion to Dismiss, which, under the rules of that Court, serves the function of a Demurrer.

STATEMENT OF THE CASE.

On January 15, 1913, the Post Office Department of the United States advertised for bids for the services of four automobiles equipped for the parcel post delivery and collection service, together with one relief machine to be on hand at all times, the machines to be new and of an especial type not fit for any other service, the chauffeurs to be furnished by the contractor, "proposals to be submitted upon the basis of a contract for four years;" on January 17, 1913, the Appellant Wells submitted a bid which was accepted and a written contract was signed on February 14, 1913.

The Bill averred. (R. p. 3.)

"At the taking effect of the contract, the plaintiff was required by the United States of America to purchase five (5) new automobiles and their equipment for use under said contract, and he did at that time purchase five (5) new automobiles at a cash cost to him of $9,250. In order to carry out said contract to the satisfaction of the United States of America, the plaintiff was at the same time required and he did, construct and equip a garage and repair shop in which to house, repair and keep in first-class condition the said five (5) automobiles. The cash cost to the plaintiff of constructing a building into a garage with the necessary fire-proofing and sewerage required by the regulations of the District of Columbia was $2,535; the necessary cash cost to the plaintiff for equipping the garage and machine shop, including electric wiring, electric motor, lathe, tools, air pump, shafting and pulleys, emery wheel, forge, oil tank, fire extinguishers, and electric light contract, was $1,120; in addition to which and necessary to the performance of said contract by the plaintiff he has paid out in cash for fire insurance premiums, liability insurance premiums, bond to the Government, for gasoline, lubricating oil, salaries, repainting and revarnishing said five (5) automobiles, $12,799; the reasonable rental value of his garage building for the two years last past devoted to said contract is $1,200; the reasonable value of his own time and services for the two years last past devoted to the execution of said contracts is $4,000.

"In order to enable himself to acquire the equipment necessary for the execution of said contract,

the plaintiff borrowed the sum of $11,000 in money; devoting all of it to that purpose, and has paid interest, in addition to the expenditures above named, at the rate of 6% per annum on his said loan, a large amount of which is still owing and unpaid and will become due in February, 1915; his only means of payment must be derived from and are through the contract with the United States of America aforesaid; that he is a young man, who has succeeded in establishing a small grocery store and grocery trade in which he had made a modest living for himself and his family. If this said contract with the United States of America is interfered with by the defendant and he, the plaintiff, and the United States of America prevented from carrying it out and he, the plaintiff, deprived of its advantages, or its performance even temporarily interfered with, he will be rendered insolvent, his credit will be destroyed, his business will be wholly broken up and his prospects in life blasted

"The aforesaid building, which he constructed into, and equipped as, a garage only for the purpose of executing said contract, is first-class for that purpose, but utterly unfit for any other purpose; it is situated in the South East section of Washington City in a locality where there is no use for and no demand for automobile garages; and if plaintiff is deprived of said contract, said building will be useless and unrentable in its present condition, and will have to be again remodeled in order to be of any use or of any rental value. Each of the said five (5) automobiles is built and equipped according to the specifications set out in said contract; each is in first-class con-

dition and worth for the completion of said contract substantially its original cost; but because of the peculiar construction and equipment required by the contract, they are of no practical value, except for handling the mails and for the execution of said contract; and unless plaintiff is permitted to execute said contract, said automobiles and each one of them will be useless to him, and will be practically unsalable and of a trifling and insignificant market value, solely because equipped for said contract, while they and each one of them is worth its original cost for the execution of said contract.

"For the period of about two years the contract was carried out by both parties to their mutual satisfaction. The United States has at all times as the same became due under said contract fully paid the plaintiff, according to the terms of said contract, for the equipment and services rendered by the plaintiff under said contract.

"The plaintiff has never been guilty of any failures or delinquencies under said contract; the plaintiff has never violated the postal laws or the postal regulations.

"It is not now, and never has been claimed or pretended by the United States of America or by any person or officer whatsoever that the plaintiff, or any one in his behalf, has at any time or in any respect failed in the performance of any of his duties or obligations under said contract.

"It is not now, and never has been claimed or pretended by the United States of America, or by any person or officer whatsoever that the plaintiff, or any one in his behalf, has been guilty of

any delinquency in the performance of any obligation or stipulation of said contract.

"It is not now, and never has been claimed or pretended by the United States of America or by any person or officer whatsoever that the plaintiff, or any one in his behalf, has violated the postal laws or the postal regulations.

"It is not now, and never has been claimed or pretended by the defendant that the plaintiff, or any one in his behalf, has been guilty of failures or delinquencies, or that plaintiff, or any one in his behalf has violated the postal laws or postal regulations. Equipments and service as specified and described in said contract are still necessary to and required by the Post Office Department at Washington, D. C., and will be necessary to and required by the said Department at said place all the time up to and including the 14th day of February, 1917. The form and phraseology of said contract was prepared by the United States of America.

"The plaintiff is ready, able, willing and anxious to carry out and complete the said contract and every duty and obligation and stipulation thereto on his part to be performed, according to the terms of the said contract.

"The defendant has no power, right or authority, either as First Assistant Postmaster General or in any other capacity, to cancel said contract or any part thereof. Yet the defendant has threatened to and will, unless restrained by the Court, unlawfully, willfully and wrongfully interfere between the plaintiff and the United States of America in the carrying on and execution of said contract; in order, as he, the defendant, says 'to

conduct in Washington, D. C., an experimental combined screen wagon and city collection and delivery service.'

"The defendant proposes to, has threatened to, and will upon the first day of February, 1915, unless restrained and enjoined by the Court, announce and promulgate publicly and throughout the Post Office Department of the United States that the said contract is annulled and will, unless restrained and enjoined by the Court, by the unlawful and wrongful exercise of his office as First Assistant Postmaster General of the United States, obstruct and prevent the plaintiff and the United States of America from the further execution of said contract on the part of either of the parties thereto; will prevent the plaintiff from receiving his compensation under said contract, which now amounts to $1,034.00 per month, and the result of the said abuse of the powers of his office by the defendant will be to deprive the plaintiff in the future of all of the advantages and compensations of said contract.

"If the plaintiff and the United States of America are permitted to execute said contract according to its terms, the plaintiff will be able to repay to his creditors the money which, as above stated, he borrowed in order to pay for and acquire the automobiles and garage necessary for the execution of said contract. The said contract and the compensations thereunder have been and are the plaintiff's only resource for meeting the aforesaid obligations; plaintiff states that he has no adequate remedy at law."

The first notice which Wells had that the defendant

intended to interfere with the execution of the contract was by letter of date November 2, 1914, which advised him (Wells) that the contract would be canceled on January 31, 1915; he immediately (R. p. 4) requested a hearing and reconsideration, the matter was retained under advisement by the defendant until January 27, 1915, upon which day (R. p. 13) the determination to override the contract on January 31st was reaffirmed; the Bill was filed and a temporary injunction secured on January 27th, *while the contract was still in process of execution, while still being adhered to and carried out by both parties, and before there had been any actual interruption of it or interference with its execution by the defendant or any one else.* The defendant filed a Motion to Dismiss the Bill (R. p. 16); such a motion under Equity Rule 32, Supreme Court, D. C., serves the functions of a Demurrer. The lower Court (R. p. 17-18) held (following Chicago & N. W. Railway Co. v. United States, 104 U. S., 680), that the defendant had no right nor power to terminate the contract, but found itself of the opinion that the suit was one against the United States and that upon the face of the Bill the plaintiff had an adequate remedy at law, and for these reasons sustained the motion and dismissed the Bill; this ruling was affirmed by the Court of Appeals, and from that judgment of the Court of Appeals the case is now here.

While the trial court decided that the ~~said~~ defendant had no power or authority to cancel the contract, the Court of Appeals ruled otherwise, and that he did have the power to cancel as a matter of right: (R. p. 34) thus three questions are presented:

1. Did the defendant have the right to cancel the contract?

2. Was the suit one in effect against the United States?

3. Does the Bill show that the plaintiff had an adequate remedy at law?

These questions will be examined in their order.

DID THE DEFENDANT HAVE THE RIGHT TO CANCEL THE CONTRACT?

Of course there is not any law constituting the First Assistant Postmaster General official contract-breaker for the United States, nor empowering him to run amuck and break up this, that or the other of the Government's existing contracts; if his office possesses any power of annulment, it can only be because that power is reserved in the contract itself.

In Chicago and Northwestern Ry. Co. v. United States, 104 U. S., the Court, on page 685, said:

> "The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid and binding on the United States as well as upon the railroad company. They contain, within themselves, a mode for lessening, or if deemed best, for discontinuing entirely the described service; and provided for a proportionate reduction of the stipulated compensation. *In no other mode could the contracts be changed except by the mutual assent of the parties.*"

As to the official power of the defendant, it is conceded by appellant that the office of First Assistant Postmaster General, temporarily filled by Mr. Roper, had the right to exercise on behalf of the United States any power which the contract reserved. It is claimed by

the appellant, and is plain enough from the contract, that, as stated in the Bill, none of the causes for annulment reserved in the contract ever existed; therefore, no right to annul ever existed.

The contract upon its face specified in detail the causes for annulment (Par. 11, R. p. 7, 8) in these words:

> "And, for repeated failures or delinquencies or for violations of the postal laws or the regulations, the Postmaster General may, at his option, annul this contract and award a contract for supplying such equipment during the remainder of the period contemplated by this contract."

And in Paragraph 14:

> " * * * at any time during the continuance of this contract, the Postmaster General may require new or additional sureties upon the bond, * * * and in default thereof, this contract may be annulled, at the option of the Postmaster General."

The bill averred and the motion admitted that there never was any cause for annulment.

In spite of the enumeration on the face of the contract of specific *causes* for annulment, the Court of Appeals decided that another clause of the contract which empowered the Postmaster General to *"discontinue equipment,"* empowered the Postmaster General to annul the contract in its entirety *without* any cause. This was Paragraph 3. Torn from its context, dismembered and dissevered from a writing of which it is a part, and of which the other parts cannot be reconciled with such

a meaning, it might perhaps be tortured into the significance given by the Court of Appeals; but this meaning so conflicts with the sense, purpose and significance of all the other parts of the contract as to render empty and forceless every other provision which the contract contains; because with every other provision the meaning accorded to Paragraph 3 by the Court of Appeals is quite irreconcilable and utterly at war. The contract must, therefore, be examined with a view to the interpretation of Paragraph 3, which is as follows:

> "That the said Party of the Second Part hereby consents and agrees that any or all of the equipment contracted for herein may be discontinued at any time upon ninety days' notice of the said Party of the First Part."

In the examination of this contract with a view to coming at the intention of the parties, certain rules which have heretofore been established by the Supreme Court are to be availed of.

> "The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals."
>
> U. S. v. Utah N. & C. Stage Co., 199 U. S. 423.

> "In giving a proper construction, the Court is required to examine the entire contract to consider the relation of the parties, and the circumstances under which it was signed."
>
> U. S. v. Utah N. & C. Stage Co., 199 U S 423.

> "The elementary canon of interpretation is not

> that particular words may be isolatedly considered, but that the whole contract must be brought into view, and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."
>
> U. S. v. Utah N. & C. Stage Co., 199 U. S. 423.

> "We should look carefully to the substance of the original agreement, as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements."
>
> U. S. v. Utah N. & C. Stage Co., 199 U. S. 423.

In the above cited case the Court considered and gave controlling effect to the statements contained in the Government's advertisement for proposals for bids

Says the Court in another case:

> "The *written* provisions of a contract will, in case of any repugnancy, prevail over its *printed* provisions."
>
> Thomas vs. Taggart, 209 U. S. 385.

The contract at bar was upon a printed form, paragraph 3 of the contract is entirely in print; while in the quotation now taken from the contract, the italicized words are in either *manuscript* or *typewriting;* the unitalicized is in print.

"That the said party of the second part shall and will furnish and deliver at *his* sole risk and expense, in such numbers, and in such numbers at a time, as may be ordered by the Postmaster of *Washington, D. C.*, in accordance with such schedule as he may prescribe, during the period beginning *February 12, 1913*, and ending *February 11, 1917*, the following described equipments, at the price herein specified, to wit: *Four (4) automobiles with chauffeurs and such additional number of automobiles with chauffeurs to be paid for pro rata as may be required of the said party of the second part during the contract term, for use in the city delivery service of Washington, D. C. Each automobile to have a carrying capacity of not less than 1,500 pounds and be capable of maintaining a speed of 15 miles per hour; the automobiles to be painted in vermillion red shade and lettered with gold leaf with the inscription, 'United States, Mail—Parcel Post.' The sides to be provided with eighteen inch panels and a wire screen extending from the tops of the panels to the top of the machine; the back to be provided with a tail gate eighteen inches high and a hinged wire screen extending from the top of the tail gate to the top of the machine, so that the back can be entirely locked with one lock; each machine to be equipped with wind shield and side curtain. Each machine to be used eight hours daily on week days and one machine to be used approximately three hours daily on Sundays in the delivery and* in the collection of mail at *Washington, D. C.*, on routes already established, or that may hereafter be established, and to be paid for at the rate of *Three thousand one hun-*

> *dred two dollars and fifty cents per annum for each equipment,* payments to be made on the first day of each month, or as soon thereafter as accounts can be adjusted and paid."

And so with the following quotation:

> "The UNITED STATES, party of the first part, covenants and agrees to and with the said *Josephus Wells,* party of the second part, to order of said party the equipments specified and described in this contract, which may be required by the Post Office Department at *Washington, D. C.,* during the period from *February 12, 1913,* to *February 11, 1917.*"

A further canon of interpretation established by the Supreme Court is:

> "That construction should be adopted which would be more to the advantage of the defendant on the general ground that a party who takes an agreement prepared by another, and upon its face incurs obligations or parts with his property, should have a construction given to the instrument favorable to him, and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."
>
> Noonan v. Bradley, 76 U. S., 394-407.

With these three rules as guides, an examination of the Government's advertisement for proposals, of the re-

spondent bid, and of the resultant ~~the~~ written contract will now be undertaken. The purpose of this examination is to bring forward two of the primary purposes which it is conceived the parties mutually intended to accomplish, and which will serve to establish the meaning appropriate for Paragraph 3; those purposes appear to have been:

1. The supplying of whatever automobiles the Government might need for Parcel Post collections in the City of Washington during the period of four years.

2. The reservation to the Postmaster General of a practically effective power to prevent the continuance upon the streets of such equipment as became so worn and dilapidated as to disgrace and belittle the public service.

Every letter of the contract turns to these two propositions; to deny either of them is to make of the contract a senseless dribble of words. The intent of the Government to secure a time contract for a four-year term is first manifested by the advertisement for bids; this advertisement appears on page 14 of the Record and contains the following:

> "The service of four automobiles, properly equipped for the parcel post delivery and collection service, will be required for *eight hours each daily*, actual running service, except Sundays, when only one machine will be needed for three hours, actual running service. *One Relief machine to be on hand at all times*, to be used in cases of emergency. * * *
>
> "* * * The drivers or chauffeurs to be furnished by the contractor.
>
> "*The machines to be new*, equipped with substantial bodies painted and varnished a vermil-

lion red shade, and *lettered in gold leaf with the inscription 'United States Mail.'* The body to be, in size, approximately as follows: 9′ long, 4′ 10″ high, and 318″ wide at the bottom, inside measurements, at least 5′ 7″ of the length of the body to be exclusive of the seat and available for carrying capacity; *the body to be not more than 2′ 2″ from the ground; the sides to be provided with 1′ 6″ panels, and a wire screen extending from the tops of the panels to the top of the machine; the back to be provided with a tail gate 1′ 6″ high and a hinged wire screen extending from the top of the tail gate to the top of the machine, so that the back can be entirely locked with one lock;* the machines to be constructed with the engine in front, and with a running board on each side 1′ 6″ from the ground; a shield at the front and curtains at the sides; tires of the Motz type preferred.

"The machines to be kept clean and in first-class condition at all times during the contract term.

"* * * *Proposals to be submitted on the basis of a contract for four years; also the basis of a yearly contract;* and also with the understanding that *additional machines will be furnished at any time during the term of the contract* at a unit price to be stated. * * *

"Detailed information concerning the service to be performed may be obtained upon application to the Postmaster."

That the intention of the contractor was for a four-year contract is manifest from the bid of Wells (R. p. 15), "This bid is submitted on the basis of a *contract for*

four years. On a basis of a contract for one year, I submit a bid of $3,558.75 per car; it is understood that *additional cars will be furnished at any time during the term of the contract* at $3,152.50 per car."

That each party effected the mutual intention of securing a contract for four years is manifest from the contract itself (R. p. 6), which sets forth:

> "This contract * * * Witnesseth, that, *whereas the proposal* of the said Party of the Second Part for furnishing the said Department at Washington, D. C., in such numbers and in such numbers at a time, and from time to time according to such schedule as may be prescribed by the Postmaster of Washington, D. C., *during the period beginning February 12, 1913,* and *ending February 11, 1917,* the equipments and services hereinafter specified *was accepted* by the Postmaster General and contract therefore awarded to said party;
>
> "Now, therefore, the said Party of the Second Part hereby covenants and agrees to and with the said Party of the First Part as follows, to-wit:
>
> "1. That the said Party of the Second Part shall and will furnish and deliver at his sole risk and expense, in such numbers and in such numbers at a time as may be ordered by the Postmaster of Washington, D. C., in accordance with such schedule as he may prescribe during the *period beginning February 12, 1913,* and *ending February 11, 1917,* the following described equipments at the price herein specified, to-wit: Four automobiles with chauffeurs and such additional number of automobiles with the chauffeurs to be paid for pro rata, as may be required of the said party of the second part during the contract term,

for use in the city delivery service of Washington, D. C. Each machine to be used eight hours daily on week days, and one machine to be used approximately three hours daily on Sundays * * * and to *be paid* for at the rate of $3,102 50 *per annum for each equipment,* payments to be made *on the first day of each month,* or as soon thereafter as accounts can be adjusted and paid * * * (R. p. 9.)

"In consideration of the furnishing by the said Party of the Second Part of the equipments hereinbefore agreed by it to be supplied, and of his performance of all the other of the foregoing stipulations and agreements on his part to be kept or performed, each and all of which are hereby made conditions of this contract—*the United States,* Party of the First Part, covenants and *agrees* to and with the said Josephus Wells, Party of the Second Part, *to order of said Party the equipment specified and described in this contract which may be required by the Post Office Department at Washington, D. C., during the period from February 12, 1913, to February 11, 1917,* and to pay to the said Party of the Second Part for such equipment so supplied * * * at the price hereinbefore specified. * * * * "

The bond which the Government prepared and required Wells to give contained (R. p. 10):

"The conditions of this obligation are such that if the above-bounden Josephus Wells * * * shall well and truly and in a manner satisfactory to the Postmaster General furnish the equipment described in the foregoing contract executed on

6th February, 1913, by the principal herein, for *supplying to the Post Office Department* at Washington, D. C., *during the period beginning February 12, 1913, and ending February 11, 1917*, and in all other respects do and perform the covenants, agreements and stipulations of such contract on their part to be performed, then this obligation to be void and of no effect; otherwise, to remain in full force and virtue."

The Bill avers and the motion to dismiss admits (R. p. 3):

"At the taking effect of the contract, the plaintiff was *required by the United States of America to purchase five (5) new automobiles and their equipment* for use under said contract, and he did at that time *purchase five (5) new automobiles at a cash cost* to him *of $9,250*. In order to carry out said contract to the satisfaction of the United States of America, *the plaintiff was at the same time required*, and he did, *construct and equip a garage and repair shop* in which to house, repair and keep in first-class condition the said five (5) automobiles. The cash *cost* to the plaintiff *of constructing* a building into *a garage* with the necessary fire proofing and sewerage required by the regulations of the District of Columbia *was $2,535*; the necessary cash cost to the plaintiff for *equipping the garage* and machine shop, including electric wiring, electric motor, lathe, tools, air pump, shafting and pulleys, emery wheel, forge, oil tank, fire extinguishers, and electric light contract, *was $1,120*; in addition to which and necessary to the performance of said

> contract by the plaintiff he has paid out in cash for fire insurance premiums, liability insurance premiums, bond to the Government, for gasoline, lubricating oil, salaries, repainting and revarnishing said five (5) automobiles, *$12,799;* the reasonable rental value for his garage building for two years last past devoted to said contract is $1,200; the reasonable value for his own time and services for the two years last past devoted to the execution of said contracts is $4,000."

In view of the foregoing, wisdom will never conclude that the parties intended Paragraph 3 to give the Postmaster General the right to instantly annul the contract without cause. If he had power to annul the contract without cause, he might have annulled it the day after it was entered into; the moment after Wells had bought five new automobiles at a cost of nine thousand dollars which were useless for any other purpose than filling this particular contract with the Government; the moment after Wells had borrowed the money for, and built and equipped a garage suitable for no other purpose than to execute the contract.

Moreover, when several causes for annulment are specified in a contract, the rules of construction invite the conclusion that no other causes of annulment beyond those specified were contemplated by the parties. Again, the phrase contained in Paragraph 11 (R. p. 8) "The Postmaster may *annul* this contract and award a new contract for supplying such equipment" is not synonymous with the phrase (R. p. 7) "Any or all of the equipments contracted for herein may be *discontinued* at any time upon ninety days' notice from the said Party of the First Part," contained in Paragraph 3. The expressions do not mean the same; both expressions

are in the contract; the meaning of one is different from the meaning of the other; yet the Court of Appeals held them synonymous; held that the words: "Any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said Party of the First Part," reserved to the Postmaster General the right to annul the contract *without cause;* if this be true, why do *subsequent paragraphs No. 11 and No. 14, of the contract, specifically set forth causes for annulment?* Why do paragraphs 11 and 14 provide for an annulment upon specified causes, if a prior paragraph 3, was intended to reserve the right of annulment without any cause whatever? Manifestly, the parties intended by the words quoted from Paragraph 3 to provide for some other contingency than that contemplated by the "annulment" words contained in Paragraphs 11 and 14; the words, "discontinuing equipment" were intended to mean something different from and provide for some other contingency then the words, "annulling the contract."

The subject matter of the contract, together with the phraseology of the document itself causes readily to appear this other contingency for which the parties intended to provide.

The subject matter of the contract was an especial kind of public vehicles to discharge the important governmental function of collecting the United States mails upon the public streets of the National Capital in the open day, during business hours; that the good appearance and respectable serviceability of these mail-collecting automobiles was a matter of public and governmental concern is not to be gainsaid; that such was intended to be secured by the terms of the contract is manifest from its provision.

Thus: (R. p. 7.)

> "5. That the automobiles will be kept in good condition, and in good repair, painted and varnished in a thorough manner, clean and in good condition, and lettered *and ornamented,* all in a manner to be approved by the said Postmaster."

It was appropriate to settle on some practical method making absolute to the Postmaster General a way of instantly enforcing this provision of the contract, rather than to leave to the United States only an action in damages for its breach, or a right to annul the contract in its entirety for failure in this respect, and thereafter to go without any mail collections until it could proceed again into the market for the securement of another and perhaps less advantageous contract. What method could be devised to assure to the Government during the four years of the contract the practical control of the appearance and condition of the equipment which went out publicly upon the streets? It is true that Paragraph 11 (R. p. 7) provides for "fines" to be imposed by the Postmaster General for "Failure to keep the equipment in first-class repair and properly painted," but fines *do not assure the discontinuance of dilapidated equipment;* the contractor may pay the fines, and in broken down equipment rattle the public service along into disrepute as before.

It is further true that Paragraph 11 provides, "for repeated delinquencies" the Postmaster General may "annul" the contract; but "annulment" may be disadvantageous to the Government; hourly schedules of mail collection are to be maintained, interruption would mean confusion and disaster; another contract may not be had on terms so satisfactory as the first; indeed, there exist many reasons why the Postmaster General might not wish to "annul" for the single failure to supply new

equipment to replace that which had become unserviceable beyond repair, or unsightly beyond redemption. Neither "fines" nor "annulment" supplies for the Government a practical method of forcing equipments to be kept up in first-class appearance and condition during the period of four years; how then, is this to be achieved? It can be accomplished in but one way; by empowering the Postmaster General to discontinue and put out disreputable equipment, without thereby "annulling" the contract.

Such a power of discontinuance would require as well some contractual provision for supervision which would enable the Postmaster General to inspect every part of the equipment in use by the contractor and thus inform himself of its state and condition. This the contract supplies (R. p. 7):

> "8. That the full equipment will be submitted to the inspection of the said Postmaster at such times and places as he may designate."

So that the prerogatives reserved to the Postmaster General were three:

1. The power to *fine* for "failure to keep the equipments in first-class repair and properly painted."

2. The power to *discontinue* equipment.

3. The power to *annul* the contract for *repeated* failures or delinquencies or for violations of the postal laws and regulations, or for failure to renew the bond when so required.

Thus, even if Paragraph 3 is susceptible of two meanings (one that accorded by the Court of Appeals) yet one meaning is in harmony with Paragraphs 11 and 14, while the other is utterly inconsistent therewith, and renders the provisions of Paragraphs 11 and 14 upon the point of

annulment for cause, utterly impotent, superfluous and senseless.

There exist reasons other than that above discussed, why the Government might desire to "discontinue equipment" without "annulling the contract;" the trial Court found (R. p. 17):

> "The proper interpretation of the paragraph is that the use of all or any of the automobiles may be discontinued according to the volume of the business to be done by the Post Office at the time for which they were to be used. If the contention of the Government is sound, it might have given notice of termination the day after the plaintiff equipped himself with the automobiles, and an interpretation which would give such power to the defendant would certainly be unreasonable. No one would contract with the Government in a matter of this kind on any such basis if clearly understood."

If a phrase is susceptible of two meanings depending upon whether the paragraph stands isolated and alone, or whether it stands associated with other terms, and the other terms are in conflict with the meaning which the phrase might have if it stood isolated, it thereby becomes apparent that the parties intended it to convey the meaning which goes along with the other terms and did not intend that meaning which runs counter to the other terms. So it is with Paragraph 3: To say that Paragraph 3 provides that the Government may annul the contract without cause, is to wipe out the whole of Paragraphs 11 and 14, and each of the several provisions which they contain; to say that Paragraph 3 provides for the "discontinuance of equipment" *without* annulling

the contract harmonizes with each provision contained in Paragraphs 11 and 14, and gives operation to the specified causes of annulment therein contained. To say that Paragraph 3 means that the Government might annul the contract without cause is in conflict with the proposal for bids, which required *four new machines built in such manner as to be utterly useless except for collecting the Government mail*, and in conflict with "*proposals to be submitted on the basis of a contract for four years; also the basis of a yearly contract.*" To say that Paragraph 3 means that the Government may annul the contract without cause is in conflict with the proposal of Mr. Wells in reply to the advertisement; "This bid is submitted on the basis of a contract *for four years*. On the basis of a contract *for one year*, I submit a bid in $3,558.75 per car." To say that Paragraph 3 means that the Government may cancel the contract without cause is in conflict with the contract itself which states: (R. p. 6) "Whereas the proposal of the said Party of the Second Part for furnishing * * * *during the period beginning February 12, 1913, and ending February 11, 1917*, * * * *was accepted* by the Postmaster General;" it conflicts with "Party of the Second Part shall and will furnish * * * *during the period beginning February 12, 1913, and ending February 11, 1917* * * * four automobiles with chauffeurs, and such additional number of automobiles with chauffeurs to be paid *for pro rata as may be required* * * * *during the contract term*, for use in the city delivery service of Washington, D. C. * * * letters in gold leaf with the inscription 'United States Mail—Parcel Post,' *to be paid for at the rate of $3,102.50 per annum for each equipment* * * * that the automobiles shall be *new at the beginning of the contract term;* * * * that not less than one extra equipment to take the place of such as may be tempo-

rarily disabled or withdrawn from the service, will *be kept on hand without extra compensation therefor;* * * * that *during the period covered by this contract, in the event the Party of the Second Part should fail to furnish the equipments* * * * *current requirements may be supplied by procuring in the open market* equipments of the character agreed to be supplied under this contract; * * * that neither this contract nor any interest therein shall be transferred or assigned by the Party of the Second Part * * * that at any time during the continuance of this contract, the Postmaster General may require new or additional sureties upon the bond hereto annexed; * * * that the annulment of this contract * * * shall not release or impair its obligation upon said Party of the Second Part and the sureties upon his bond, * * * but the liability of the said Party of the Second Part and his said sureties, * * * shall subsist notwithstanding such annulment * * * as fully as if this contract in all respects continued in force and effect; * * * the *United States, Party of the First Part, covenants and agrees to* and with the said Josephus Wells, Party of the Second Part, *to order of said Party the equipment specified and described in this contract, which may be required by the Post Office Department at Washington, D. C., during the period from February 12, 1913, to February 11, 1917.*"

To say that Paragraph 3 means that the Government may annul the contract without cause is in conflict with the conditions of the bond which the Government required:

> "The conditions of this obligation are such that if the above bondant Josephus Wells * * * shall well and truly * * * furnish the equipment described in the foregoing contract * * * for

supplying to the Post Office Department at Washington, D. C., *during the period beginning February 12, 1913, and ending February 11, 1917.*"

From the foregoing it appears that the meaning accorded to paragraph 3 by the Court of Appeals cannot be reconciled with either

1. The advertisement for bids prepared by the United States.
2. The bid in response to the advertisement.
3. The resultant contract prepared by the United States.
4. The Bond prepared by the United States.

The conclusion that Paragraph 3 was intended to give the Government the right to *annul the contract without cause*, is not to be arrived at by the process of reasoning.

WAS THE SUIT AGAINST THE UNITED STATES?

If the parties to an executory contract are with mutual satisfaction each carrying out its terms, and a "third party" undertook by physical or other means to interrupt and prevent its further completion, not only would a suit for injunction lie against him, but that particular suit would not be a suit against either of the contracting parties. The appellant does not hesitate to admit that if the contractual status between him and the United States had been actually undone and destroyed by breach *before* he filed his Bill against the defendant, if Wells had either rightly or wrongly been put out of contractual relations with the United States before he filed his Bill, so that the contractual status between him and the United States did not exist at the time he filed his Bill, then a suit, the purpose of which was to restore him to a contractual status with the

United States, would in effect be a suit against the United States. For, while the United States has no agent or officer empowered by law to *break* its existing contracts, yet it does have agents and officers authorized by law to *admit persons to contractual status* with the United States, and a suit against such an officer as had lawful power to admit to the contractual status with the United States would be a suit to control an officer of the United States in the discharge of a function which by law belonged to him to discharge on behalf of the United States; therefore, the suit would be in effect against the United States. A suit against an officer to require him to perform a discretionary function which the law vests in his office and *empowers* him to perform, is quite different from a suit to prevent individuals who happen to hold public office from perpetrating an *unlawful act* which is not a function of the office which he happens to hold, and which no law of the United States authorizes him to commit on its behalf or on any other behalf. If it were possible for an Assistant Postmaster General of the United States to be ill-minded, can it be that such a one could be suffered without cause wilfully to annul all of the many thousands of time contracts which the Post Office Department has with railroads and other common carriers for the carrying of the mails, and successfully plead to all suits brought against him either by contractors or by the United States itself, that each suit was *against the United States* and thus go unhindered and uncontrolled? Suppose that instead of Wells, the Attorney General of the United States had instituted this action against the defendant, and had averred as the Bill at bar avers, that the contract was desirable for and advantageous to the United States; that the defendant unlawfully intended to interfere with it and unlawfully to prevent its execution in the future, and praying that

he might be enjoined from so doing; would such a suit by the Attorney General against the Defendant be a suit against the United States? To make such a suit out of that pending at bar no more would be necessary than to change the name of the plaintiff in the title of the cause.

It is only because the defendant happens to hold public office that any mind can hesitate over the question whether this particular defendant, who happens to be also an officer of the United States, is or is not, for the purposes of the suit at bar, a "third party" in respect to his proposed interfering with an existing and mutually satisfactory contract between the United States and a citizen.

If the defendant is but a "third party" unlawfully proposing in the future to interfere with and prevent the execution of an existing contract, then a suit against him is not in effect against the United States; but if the defendant is the agent of the United States for the purpose of repudiating and throwing out its validly existing executory contracts, then his action in so doing is the action of the United States, and a suit against him to prevent such acts upon his part would be a suit to control an agent of the United States in the execution of his authority on behalf of the United States, and would be in effect a suit against the United States.

In short, in order for the suit to be "against the United States" the act complained of must be an "official act;" that is, one to which the Postmaster General was empowered by law, and therefore belonging to whoever at the time held office.

So that the question, "Is the suit in effect against the United States?" turns on whether the defendant is agent of the United States, authorized to perform on its behalf the threatened unlawful future act of which the appellant complained; and the threatened future act is

to physically and unlawfully prevent the United States and a citizen from completing an existing time contract lawfully made and mutually just. Is law supposed to vest in the First Assistant Postmaster General official power to unlawfully cancel, without cause, the contracts of the United States and of its citizens?

Even though the defendant be First Assistant Postmaster General, due humility may venture to doubt that the identity of the United States is lost in his personality; and even to question whether his powers over the contracts of the United States are broader than those which belong to the office which he distinguishes; and moreover, to doubt whether, while he is in office, he can effectually direct against the rights of citizens any powers save such as are vested in First Assistant Postmasters General by the law of the land.

> "The ratio decidendi in this class of cases is very plain. A defendant, sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, can not rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act."
>
> Poindexter v. Greenhow, 114 U. S., 288.

The official duty and the official oath of the defendant required him, as it required every other officer and citi-

zen of the United States, to respect and permit effect to this contract, because it came into existence by virtue of the Constitution and laws of the United States.

Not only is there no law undertaking to vest Mr. Roper with official power to impair existing contracts, and none such could be sustained; even the whole of Congress itself could not annul this contract by specific legislation, and thus deprive Wells and the United States of their property "without due process of law," for a contract is "property."

The purpose of the suit was to prevent a defendant, who happens to hold office, from unlawfully destroying a contractual status which existed between Wells and the United States; *this contemplated act of the defendant was either lawful, or it was unlawful; if it was unlawful, it could not be official, because an official act is one authorized by law, and therefore a lawful act;* the act being unlawful, therefore unofficial, is not the act of an officer of the United States as such, but is the personal and private project of an individual who happens also to hold public office; and being thus the act of an individual person and not an act of the United States through an officer having official power to perform it, the defendant in this personal and individual interference with the contract between Wells and the United States is as much a "third person," and as much an outsider as the veriest unidentified stranger.

Suppose the General of the Army or the Admiral of the Navy should undertake with a file of men at the Post Office to drive Wells and his automobiles off, prevent his collection of mails and prevent the completion of this contract, would an injunction suit against him be in effect a suit against the United States, and if not, why not? That he was a high official of the United States, ranking with even the defendant, would likely be con-

ceded; but the fact that he was an officer, even a very high officer, would not settle it; it would depend on whether he possessed official power to perform the act for and on behalf of the United States; and inasmuch as official power can be conferred only by law, the absence of such a law would make the act unlawful, therefore unofficial, and if unofficial, private and personal.

AN ILLEGAL ACT IS NEVER AN "OFFICIAL ACT," AND NEVER THE ACT OF THE STATE, IT IS ALWAYS THE INDIVIDUAL TORT OF THE PERPETRATOR, AND INJUNCTION OR MANDAMUS WILL CONTROL HIM.

Wadsworth v. Boysen, 148 Fed., 771, was a suit to enjoin the United States Indian Agent from obstructing the complainant from prospecting in land of an Indian Reservation; although the defendant claimed to be acting in his official capacity as a representative of the Government, the Court, after examining the powers vested by law, concluded that that which he claimed did not belong to him, and announced that the suit "is one to restrain an individual tort which would result in irreparable injury to complainant, and not one against the United States," and further said (P. 780):

> "The injunction seeks to stay the hand of an individual wrongdoer, to prevent irreparable mischief to the complainant; and consequently such wrongdoer can not be acting for and in behalf of the Government, which stands for the embodiment of law and lawful procedure."

In McConnaughy v. Pennoyer, 43 Fed., 196, the Court having concluded that certain official power which was

claimed by a Board of Commissioners did not belong to them, said on page 203:

> "This being so, the defendants are acting without the authority of law * * * without the authority of the State. They do not represent the State. The State is not a party to this suit and therefore the court has jurisdiction with the same as a suit between private persons who are citizens of different States."

And in Board of Liquidation v. McComb, 92 U. S., 531:

> "A State can not be sued by an individual without its consent * * *.
>
> "But when a plain official duty, requiring no exercise of discretion, is to be performed and performance is refused, any one who will sustain personal injury by such refusal may have a mandamus to compel its performance.
>
> "And when such duty is threatened to be violated by some positive official act, any one who will sustain personal injury thereby, for which adequate compensation can not be had at law, may have an injunction to prevent it.
>
> "* * * if in either case the officer plead the authority of an unconstitutional law, for the nonperformance or violation of his duty, it will not prevent the issuance of the writ."

The Supreme Court of the United States in a certain discussion about "suits against the State," said:

> "But in the desire to do that justice, which in

> many cases the Courts can see will be defeated by an extreme extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though its interests may be more or less affected by the decision. Among these cases are those where an individual is sued in tort for some act injurious to another in regard to person or property, in which his defense is that he has acted under the orders of the Government.
>
> "In these cases he is not sued as an officer of the Government, but as an individual, and the Court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him."
>
> Stanley v. Schwalby, 147 U. S., 518.

Again, in reviewing the decisions upon the same subject that Court said:

> "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a Department under any view that could be taken of the facts that were laid before him, was ultra vires and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."
>
> Noble v. Logging Co., 147 U. S., 171-2.

In confirming an injunction restraining the Post-

master General from excluding certain matter from the mails, the same Court said:

> "That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."
>
> School of Magnetics v. McAnnaulty, 187 U. S., 94.

Further quotations from the authorities upon the point will not be indulged in; other cases which contain the question and which were resolved against officials who, when sued concerning illegal conduct, claimed that the conduct being that of an official, the suit was in effect one against the State, are:

Osborn v. Bank of U. S., 9 Wheat, 738.
U. S. v. Lee, 106 U. S., 196.
Wells v. Nichols, 104 U. S., 444.
Scranton v. Wheeler, 179 U. S., 141.
Kendall v. U. S., 12 Peters, 524.
Hartman v. Greenhow, 102 U. S., 672.
U. S. v. Douglas, 77 U. S., 15.
Garfield v. U. S., 211 U. S., 250.

Instances in which actions were in effect against the

State and in which for that reason that defense was sustained, clearly distinguish themselves from the case at bar. They are:

U. S. ex rel. Levey v. Stockslager, 129 U. S., 470.
Louisiana v. Garfield, 211 U. S., 70.
Oregon v. Hitchcock, 202 U S., 56.
Belknap v. Schild, 161 U. S., 10.
Postal Supply Co. v. Bruce, 194 U. S., 601.
Carr v. U. S., 98 U. S., 433.

In Truax v. Raich, 239 U. S., 33, an alien sued the Attorney General of the State of Arizona to enjoin the enforcement of a labor law which he asserted was repugnant to the Federal Constitution; the Court held that the law being unconstitutional was no law at all; that the Attorney General of the State was not vested by law with the power which he was about to exercise, that therefore the contemplated act being unlawful was not an act of the State through its officer, and that a suit to enjoin it was not a suit in effect against the State; the Court on page 37, said:

> "As the bill is framed on the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the State, are about to proceed wrongfully to the complainant's injury, through interference with his employment, it is established that the suit cannot be regarded as one against the State."

Language more appropriate to the case at bar could not be evolved: "The defendant who is a public officer

concerned with the enforcement of the laws of the United States, is about to proceed wrongfully to the complainant's injury, through interference with his employment by the United States."

In the same case upon page 38 appears:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments, should similarly be entitled to protection in the absence of adequate remedy at law."

Of the paragraph quoted the words "void enactments" are synonymous with the words "unlawful acts;" and if these latter were substituted for the former the case at bar would appear.

The Truax v. Raich doctrine was affirmed in Tanner v. Little, 240 U. S., 369, wherein the Attorney General of the State of Washington was enjoined from a threatened interference. In Ex parte Young, 209 U. S., 123, it was held that a Federal Court might enjoin the Attorney General of a State whose general duty it is to enforce the State Statutes, from undertaking to enforce against persons affected, a statute which violated the Federal Constitution. On pages 159-160 the Court said:

> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the State to enforce an unconstitutional act, to the injury of complainant is a proceeding without the authority of, and one which does not affect the State in its sovereign or governmental capacity. It is simply

> an illegal act upon the part of a State official in attempting, by the use of the name of the State, to enforce a legislative enactment which is void because unconstitutional."

Is it not apparent from these cases, that if a legislature had affirmatively passed an act which directed the defendant to cancel Wells' existing contract with the United States, that act would be unconstitutional and an injunction would lie? If the State by its legislature could not create a law which would render the defendant immune from such an injunction, how can he be immune under the principles of existing law? If his act is unlawful and therefore not authoritative or official, the mere fact that a legislature undertook to authorize it by an unconstitutional act, could not be creative of the cause for an injunction; the cause for injunction lies in the absence of legality for the act, whether the act be prompted by an unconstitutional statute or be prompted by other initiatives; if the act be unlawful, it is illegal, and unofficial; and if illegal and unofficial, a suit to restrain it is in no sense a suit against the State.

That the suit was not in effect against the United States, is now made plain.

HAD COMPLAINANT AN ADEQUATE REMEDY AT LAW?

It is the functions of Courts to decide cases, not abstract questions of law; it is the business of Courts to evolve and apply to the facts of a matter the rules which the law contains for application to such particulars; a rule of law quite applicable to one case begins to lose its application to another case when the facts of the second case begin to differ from the facts of the first; so that after a while the facts of two cases may so differ

as that the rule appropriate for the one is no rule at all for the other. If the suit at bar is in effect a suit against the United States, then no need to discuss the second and present question; if the second question needs to be discussed, it is only upon the assumption that the suit is not in effect against the United States; and this means, that not being against the United States, it is not against a party to the contract; and not being against a party to the contract, it is against a third person, a stranger to the contract, who is proposing to interfere with its execution, determined to prevent its completion, and who has set out to break it up.

The relief prayed was an injunction against this third party, stranger to the contract, to prevent his unlawful and tortious interference; the *United States* is not here urging that the complainant has against it an adequate remedy at law, but here comes the third party, the stranger to the contract, who has unlawfully set out to break it up; and *he* says when an injunction is sought against him by a party to the contract, and he says it to a Court of Equity, "Pray don't prevent my breaking up that contract between those two; don't interfere with my proposed destruction of the property which the two of them have in their contract; and put your refusal upon the ground that the complainant has an adequate remedy at law."

Does he tell us against whom the "remedy at law" is? Whether against him personally, or against the United States? If he says that the complainant's remedy at law is against him Mr. Roper personally, and not against the United States, the answer is that such a defense by third persons for interfering with other people's contracts has never been favorably received and never sustained by a proper application of the doctrines of equity,

and a correct understanding of the functions and duties of its Courts.

If the defendant means to say that the complainant has an adequate remedy at law against the United States, analysis of the situation presents more replies than one.

First, an interesting query which arises thus:

If the defendant was without power to annul the contract, if he was without power to prevent its completion, then his act in so doing was not an act of the United States; the United States would not be responsible for it, the United States would not have broken the contract and the complainant would have no remedy at all against the United States.

The logic of the foregoing conclusion is not to be escaped.

But, assuming for the moment that the United States were responsible, how and to what extent could that responsibility be enforced against the United States for the benefit of the complainant?

Manifestly only to the extent that an action in the Court of Claims would afford relief; because, assuming the liability of the United States as for a breach of contract, no redress can be had against the United States, except through a proceeding in the Court of Claims, that being the only relief affirmatively authorized by statute for such cases. The proposition is, therefore, narrowed to the claim that a proceeding in the Court of Claims would afford the complainant "an adequate remedy at law."

The phrase "an adequate remedy at law" contains more than one single proposition; it contains distinctly three.

First, "a remedy;" second, "an adequate" one; third, "at law."

It will now be undertaken to show that a proceeding in the Court of Claims satisfies neither of the three essentials to this particular defense.

Premising the argument, however, by recalling that "the same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals."

U. S. v. Stage Co., 199 U. S., 423.

Is the proceeding in the Court of Claims "an adequate remedy?" Or, indeed, is it any "remedy" at all? Webster says that the law-meaning of the word remedy is "The legal means to *recover a right*, or to *obtain* redress of a wrong."

A finding of the Court of Claims is not a "judgment" in the sense of a judgment of a law court, which is enforcible by the process of execution; a finding of the Court of Claims in favor of a litigant individual is neither enforcible nor collectible as a matter of right; its effect is only advisory to Congress upon questions of fact, but in no sense obligatory upon the United States with respect to liquidation; the statute upon the subject, section 143 of the Judicial Code, provides only that the Clerk of the Court of Claims shall transmit to Congress a statement of all the judgments rendered by the Court during the previous year; there is no law requiring the payment of such judgments and they can not be paid without Congress sees fit to make an appropriation to provide for their payment.

Entering the Court of Claims is an abandonment of all possibility of enforcing redress *as a matter of right*, and leaves the matter altogether in the discretion of Congress.

If there were no statute which permitted suit to be

instituted against the United States, doubtless the very fact that the Government could not be sued would be ground for injunctive relief against the individual defendant; and equitable relief is not to be withheld merely because some kind of a statutory proceeding can be *instituted* by the complainant; the reason is that the privilege to *institute* a statutory proceeding does not amount to a "remedy." "Remedy" consists in *obtaining redress as a right*, not in begging about for it as a favor.

Again, even if it be thought that a proceeding in the Court of Claims is a "remedy," can it be said that it is a remedy "at law?"

> "Suits against the Government in the Court of Claims, whether reference be had to the claimant's demand, or to the defense, or to any setoff or counter-claim which the Government may assert, are not controlled by the seventh amendment. They are not suits at common law within its true meaning."
>
> McElreth v. U. S., 102 U. S., 440.

The only "remedy at law" for breach of a contract is the common law action of damages for breach, which contains a jury trial and the process of execution, both as a matter of distinct right. The seventh amendment of the Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *" so that no "remedy" is a "remedy at law" for breach of contract unless it contains the rights to a jury trial and a writ of execution.

> "The trial by jury is justly dear to the American people. It has always been an object of deep

> interest and solicitude, and every encroachment upon it has been watched with great jealousy. * * *
>
> "By 'common law' the framers of the Constitution of the United States meant what the Constitution denominated in the third article, 'Law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered."
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> Parsons v. Bedford, 3 Peters, 433.
>
> See also Trust Co. v. Shoenfelt, 153 Fed., 484.
>
> Thomas v. Council Bluffs, etc., 92 Fed., 424.

In Hipp v. Babin, 60 U. S., 279, the Court said:

> "And the result of the argument is, that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a *constitutional right to a trial by jury.*"

If this principle be applicable to one of the parties to litigation, it is applicable also to the other; if the *law* affords any particular complainant an *adequate* remedy, he must concede the right of a defendant to a jury trial and take his case to law; conversely, a statutory proceeding which denies the complainant a jury trial for the violation of a common law right (breach of contract) which denies him a judgment which can be en-

forced by the writ of execution, is not in the nature of things the remedy which the common law contains for that kind of a wrong.

The sixteenth section of the judiciary code of 1789 (Judicial Code, section 267) provides: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law." This reference to the remedy at law does not contemplate statutory proceedings which were unknown to the Common Law; as said in Peck v. Ayers, 116 Fed., 274, it "intends the remedy at common law, as it existed at the date of the Judiciary Act, and does not refer to remedies which might be thereafter given by the statutes of the State in their own courts."

From the foregoing it is manifest that a proceeding against the United States in a Court of Claims is not a "remedy," for the reason that it gives no *right* to actually *obtain* and *secure* even financial redress in the form of money damages.

A proceeding in the Court of Claims is not "at law" for the reason shown above. Even if such a proceeding were a "remedy," and was "at law" yet in the case at bar it is manifestly not "adequate."

The peculiar equities of the case already quoted from the bill on pages 6, 7 and 8 ante, are such that the very rights which are most vital to the complainant could not be the subjects of or be measured in the elements of damages for a breach of this particular contract. The plaintiff on securing the contract staked his whole future and all of his resources upon his faith in the honor and integrity of his Government; he borrowed $11,000.00 to equip himself and has no means except the proceeds of the contract to repay the loan; could he recover the amount of this loan in an action for damages and thus satisfy his creditors? Manifestly not, and even if he

could, his credit would be ruined and he financially destroyed years before his claim could be even tried.

Could he in an action for damages recover what it cost to turn the building into a garage and to equip it as a garage and a machine shop? And even if he could, would he in such action be permitted to recover for loss in rental value of the garage premises? Clearly not, and even if one were disposed to answer "Yes, he could recover this," yet how could the measure of damages be determined? It is not a question of ascertaining and applying the measure of damages for a physical injury to real property which was producing an ascertainable rental value; nor is it a question of the measure of damages for withholding the physical possession of real property possessing a rental value; it is a case of the adaption of real estate which is in no way inherently connected with a contract so that it is of great value in connection with the contract, but of no value without the contract; and the nature of the changes made to render it adaptable to the contract are such as to *destroy the rental value which it did once possess and leave it unsalable, unmarketable and without rental value in its present state.* How is this resultant loss recoverable, or if recoverable, how is it to be measured in an action for breach of contract?

Again concerning the five automobiles—

The bill states (R. 4) that because of the peculiar construction and equipment required by the contract, they are of no practical value except for handling the mails and for the execution of the contract; and if the defendant is permitted to break up the contract, the automobiles will be useless to the complainant, will be practically unsalable and of a trifling and insignificant market value, solely because equipped for the contract, while they are worth their original cost in the execution of

the contract. How can this particular loss be an element of damages, and how measured in an action for breach of contract?

Finally, there are involved considerations of public policy which in themselves alone would seem to require recognition of the propriety of the suit.

1. Are gentlemen who happen to be inducted into public office to be encouraged or permitted during their ephemeral incumbency to unlaw the Government's Departments, dissunder the Government's affairs, to illegally upturn the contractual status of the Government with its contractors, to deprive the Government and the public of the benefit of advantageous contracts and wantonly to run amuck over the property rights of both citizens and Government? Is it conducive to the welfare of Government and of the general public to establish as a rule, that while interference with the performance of Government contracts by most persons is confessedly unlawful, yet the law has no means of preventing such interference if the wrongdoer happens to have hold on some public office? Will it be conducive to general and competitive dealings with the Government for the Courts of the country to put forth to the public the assurance that those who enter into executory contracts with the Government must understand that if an intermeddling wrongdoer happens to hold office, he will for the time being be permitted to interrupt and break up contract no matter how illegal, unwarranted, and unlawful his act may be in point of law, and no matter how immoral, unjustifiable, destructive, and unfair in point of equity? No responsible person and no established business concern would or could afford to deal with such a Government; the field of supplying the Government requirements would be and ought to be abandoned to the adventurers who are equally unreliable. Again, does it

make in favor of or against public policy to permit officers by acts confessedly illegal, unlawful, and beyond their official power, to subject the Government to claims for large damages and thus suffer the public purse and the money of the people to be pirated for their payment?

As was said by the Supreme Court in Walla Walla v. Water Works, 172 U. S., 12:

> "This Court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity * * *. Where irreparable injury is threatened, or the damage be of such a nature that it can not be adequately compensated by an action at law, or is such, as from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction. In such a case as this, the remedy will save to one party or the other a large pecuniary loss—to the city, if it be obliged to pay to the plaintiff damages occasioned by the establishment of its competing works; to the plaintiff, if it be adjudged that the city has a right to do so."

In Boyce's Executors v. Grundy, 3 Peters, 210:

> "This Court has been often called upon to consider the sixteenth section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy.

> "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

Cases innumerable could be shown where the phraseology "It is not enough that there is a remedy at law, it must be plain and adequate" appears; so far as Courts have announced the general legal rule, there is no trouble; but equity is more a matter of conscience than it is of law.

Equity is the medium for attaining adequate justice in those cases wherein the law by reason of its universality is deficient.

As heretofore observed, Courts are constituted to decide cases, not abstract questions of law. The case at bar can not justly be decided without a just consideration of the facts laid down in the bill, and a conscientious balancing of those particular facts against the adequacy and the efficiency of a proceeding against the United States in the Court of Claims, which is not a "Court" in the sense of the Common Law—without a trial by jury—without the right to a strict judgment if successful—without the right to an execution—without the right to enforce payment of an award for damages—without the right to recover as damages the elements pertaining to both person and property, which are most destructive to the complainant—can this mere opportunity for mendicancy be honestly said to constitute "an adequate remedy at law?"

Fortunately and unusual for an equity case, there is an instance in the books on all fours with the case at bar in so far as certain of the facts which it contains have by high authority been held in themselves alone

not only to justify, but to require equitable intervention; it is that of Watson v. Sutherland, 72 U. S., 74. In that case as in this, it appeared (P. 75) that the plaintiff "was a young man, recently engaged on his own account in merchandising, and if his store was closed, the goods taken from him, or their sale even long delayed, he would not only be rendered insolvent, but his credit destroyed, his business wholly broken up and his prospects in life blasted;" for these reasons alone the injunction was granted, and the Court said (P. 79):

> "Loss of trade, destruction of credit, and failure of business prospects are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation can not be awarded in a trial at law.
>
> "Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fails to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine; brings the parties before it; hears their allegations and proofs, and decrees either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued."
>
> Watson v. Sutherland, supra.

"A remedy at law must be complete and ample, not doubtful and uncertain, in order to deprive a party of his remedy in equity."

Edsell v. Briggs, 20 Mich., 429.

"A bill in equity may be sustained solely on the ground that it is the most convenient remedy."
Cavenaugh Sons Co. v. Jackson, etc., 186 Pa. St., 443.

"The application of the rule that equity jurisdiction can not be invoked where there is an adequate remedy at law depends on the circumstances of the particular case and rests in the sound discretion of the Court, where there are any circumstances which show that the legal remedy may not be perfect and complete."
Mutual Life Ins. Co. v. Pearson, 114 Fed., 395.

"The objection that the defendant has a complete remedy at law for the wrong of which he complains in his cross-bill can not be sustained unless the remedy at law is 'as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity.'"
Springfield Milling Co. v. Barnard, etc., 81 Fed., 261.

That the judgment of the Court of Appeals should be reversed, and the case remanded for appropriate proceedings is

Respectfully submitted,

DANIEL THEW WRIGHT,

T. MORRIS WAMPLER,

For Appellant.

Supreme Court, U. S.
FILED
DEC 18 1917
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

JOSEPHUS WELLS, *Appellant*,
vs.
DANIEL C. ROPER, *Appellee*.

October Term, 1917
No. 168.

BRIEF IN REPLY TO CLAIM THAT CASE IS "MOOT"

DANIEL THEW WRIGHT,
Attorney for Appellant.

Judd Printing Company, Washington

IN THE

Supreme Court of the United States

JOSEPHUS WELLS, *Appellant*,
vs.
DANIEL C. ROPER, *Appellee*.

October Term, 1917
No. 103.

BRIEF IN REPLY TO THE CLAIM THAT THE CASE IS "MOOT."

A "controversy" is one thing; the remedy is another. A "controversy" is none the less such because a party to it happens to ask for inapt relief. The "controversy" at bar is whether or not the defendant had a right to cancel the plaintiff's contract; if not, plaintiff was entitled to some remedy either at law or in Equity; unfitness of one remedy does not settle the "controversy" nor wipe out the right to the other.

The Court of Appeals has determined that the defendant did have the right to cancel the contract; so long as that decision stands it is "res judicata" and settles the "controversy" against the plaintiff, and will prevent relief in the Court of Claims or in any other court which the plaintiff may seek, unless that decision is reversed here. The Court of Appeals has decided not only that appellant is not entitled to relief in Equity, but also that he is not entitled to relief at law; that conclusion is upon the view that the defendant had the right to cancel the contract; this finding of the Court of Appeals if unreversed, can be successfully pleaded as a defense of *res judicata* in any action the plaintiff might bring in the Court of Claims or elsewhere. The "controversy" is over the meaning of the contract and the plaintiff's rights under it; the question of appropriate remedy is ancillary to, but is not the "controversy." Both the statutes, and Equity Rules, provide for the situation; Section 274a of the Judicial Code, in a Chapter entitled, "Provisions common to more than one court" (Act March 3, 1915, C. 90) provides:

> "In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings."

Equity Rules 22 and 23 are as follows:

> "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."
>
> "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

In Richardson v. McChesney, 218 U. S., the Court, on page 492, said:

> "The duty of the Court is limited to the decision of actual pending controversies, and it should not pronounce judgment upon abstract questions * * *."

It is the burden imposed by the judgment below from which the plaintiff in error desires to be relieved, a burden which deprives him of an action at law against the United States.

As indicated in Campbell v. California, 200 U. S. 87,

and as Chief Justice Taney said in Lord v. Veazie, 49 U. S. 255:

> "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested can not adjust them by agreement between themselves—and to do this upon the full hearing of both parties."

As appears from Little v. Bowers, 134 U. S., 547, if there exists "an actual controversy, involving real and substantial rights, between the parties to the Record," the case can not be moot merely because a remedy which might have been granted when the appeal was taken, becomes impracticable through mere lapse of time, without affecting the existence of the cause of action. A satisfactory test of "moot" cases appears in Kimball v. Kimball, 174 U. S., 158, thus:

> "If it is impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

At Bar, a reversal of the judgment of the Court of Appeals would restore to the plaintiff his right to an action at law against either the defendant or the United States, of which right the judgment below has deprived him, by determining that he has no cause of action; a reversal will further relieve him of costs, and of liability on the bond given for the restraining order.

> "The duty of this court as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which can not affect the matter in issue in the case before it."
>
> American Book Co. v. Kansas, 193 U. S., 52.

EXPIRATION OF CONTRACT PERIOD MAY BE A DEFENSE AGAINST EQUITABLE RELIEF, BUT CAN NOT WIPE OUT A CAUSE OF ACTION AT LAW.

This distinction was drawn in Yazoo & Miss. Valley R. R. Co. v. Adams, 180 U. S., 28. In that case was a Motion to Dismiss on the ground that the purpose and object of the injunction bill had failed because of subsequent developments which rendered an injunction impracticable and impossible; the court held:

> "This is a defense to the merits of the case, and is no ground for the dismissal of the appeal." (Page 31.)

In Mills v. Green, 159 U. S., 651, the court said:

> "When, pending an appeal, an event occurred without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the appeal; and such event, when not appearing in the record, may be proved by extrinsic evidence."

In the Mills Case on page 654 the Court collated the authorities supporting the proposition:

> "* * * the court nevertheless is not deprived of the authority whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit * * *"

Wherefore it is manifest that an unsettled "controversy" exists over whether the plaintiff's rights were violated by the interruption of his contract and that this controversy is not settled or rendered "moot" because the period for the performance of the contract has expired.

Respectfully submitted,

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Attorney for Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

JOSEPHUS WELLS, APPELLANT,
v.
DANIEL C. ROPER, FIRST ASSISTANT POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE. | No. 103.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

STATEMENT.

This is a suit to enjoin an alleged interference by Daniel C. Roper, First Assistant Postmaster General, with a contract between the plaintiff Wells and the Postmaster General acting for the United States.

The bill was filed January 27, 1915, in the Supreme Court of the District of Columbia. (R., 1.) On January 29, 1915, a temporary injunction was issued as prayed. (R., 15.) On February 10, 1915, a motion was made to dismiss the bill. (R., 16.)

This motion was sustained, and on April 5, 1915, the Supreme Court entered a final decree dissolving the temporary injunction and dismissing the bill. (R., 25.)

The case is here on appeal from a decree of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court. (R., 28, 35.)

The contract was made February 14, 1913. (R., 6.) By its terms the plaintiff agreed for a stipulated compensation to furnish during the period of four years beginning February 12, 1913, and ending February 11, 1917, four or more automobiles with chauffeurs, as ordered by the Postmaster of Washington, D. C., equipped according to specifications, for use in collecting and delivering mail at that place. (R., 6.)

Section 3 provides—

> That the said party of the second part [Wells] hereby consents and agrees that any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part [the Postmaster General]. (R., 7.)

Section 11 provides that fines may be imposed by the Postmaster General for failure to meet the requirements of the contract, and that for repeated failures or for violations of the Postal Laws and Regulations the Postmaster General may annul the contract. (R., 7–8.)

Section 18 provides—

> That all acts done by the First Assistant Postmaster General in respect of this contract

> shall be deemed and taken, for all purposes, to be the acts of the Postmaster General, within the meaning and intent of this contract. (R., 9.)

By the Act making appropriations for the Postal Service, approved March 9, 1914, 38 Stat., 295, c. 33, the Postmaster General was authorized to use such portion of an appropriation of $2,600,000 as may be necessary

> for the purchase and maintenance of wagons or automobiles for and the operation of an experimental combined screened wagon and city collection and delivery service. (p. 300.)

Acting under this authority the Postmaster General determined it to be in the interest of the service to conduct such an experiment at Washington, D. C. (Pet., Ex. B, R., 12.)

In order to do so the Post Office Department deemed it essential to discontinue the use of the equipment furnished by the plaintiff under the contract of February 14, 1913. (Ibid.)

Accordingly, on November 2, 1914, the First Assistant Postmaster General apprised plaintiff of the situation and notified him under authority of Section 3 of the contract that the use of the automobiles furnished by him—

> will be discontinued at the close of business January 31, 1915, and the contract cancelled effective on that date. (Ibid.)

The plaintiff protested and was heard through counsel, but the Post Office Department adhered to its decision. (Pet., Ex. 3, R. 13.)

Thereupon this bill was filed, alleging that in fulfillment of the contract the plaintiff had bought, equipped and maintained at great expense five automobiles; that there was still need for this equipment in the collection and delivery of mails in Washington, D. C., and would be for the full term of the contract; that the Postmaster General had no authority to discontinue the use of the equipment or to cancel the contract except for delinquencies on the part of the plaintiff, and that none such were charged; that the defendant by the unlawful and wrongful exercise of his office as First Assistant Postmaster General was threatening to interfere with the performance of the contract; that having been designed and equipped for this special purpose the automobiles were fit for no other, and that for this and other reasons stated the plaintiff would suffer irreparable injury if the use of the automobiles should be discontinued before the expiration of the term of the contract. (R. 1–4.)

The bill prayed that the defendant be enjoined—

> from annulling or attempting to annul the said contract and from interfering or attempting to interfere between the plaintiff and the United States of America in the proper and lawful performance and execution of said contract by the plaintiff according to its terms. (R., 5.)

On behalf of the defendant the United States Attorney for the District of Columbia moved to dismiss the bill on the grounds, amongst others, 1st, that it was in legal effect a suit against the United

States beyond the jurisdiction of the court; 2nd, that if any right of the plaintiff had been violated or was threatened, he had a plain, adequate, and complete remedy at law; 3rd, that by the true construction of the contract Mr. Roper as First Assistant Postmaster General was authorized to discontinue the use of the plaintiff's equipment in the manner alleged. (R., 16.)

While the trial court apparently thought that the Post Office Department would be justified in discontinuing the use of any or all of the automobiles only by a falling off in the volume of the business for which they were to be used (R., 17–18), it dismissed the bill, holding it to be in legal effect a suit against the United States of a kind which the United States has not consented to (R., 19); that no irreparable injury to plaintiff was threatened (R., 20); and that the plaintiff's remedy was by suit against the United States in the Court of Claims (R., 22–23).

The Court of Appeals affirmed the decree dismissing the bill on the grounds stated by the trial court and also on the ground that the Post Office Department was authorized under the contract to discontinue the use of the automobiles furnished by the plaintiff, saying on that point—

> It appearing that Congress had made an appropriation for experimental service in Washington which might conflict with that in plaintiff's contract, the First Assistant Postmaster General notified him of the discontinuance of his equipment. This he had a right to do under the contract. It was within his discretion.

The fact that he accompanied it also with notice that the contract would be canceled is immaterial, for the reason that the discontinuance of the equipment, which was the sole service to be performed by the plaintiff, was itself a termination of the contract. (R., 34–35.)

ARGUMENT.

I. THE CASE IS MOOT.

II. IT IS A SUIT AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED.

III. IN NO EVENT IS IT A SUIT WITHIN THE EQUITY JURISDICTION, THERE BEING A PLAIN AND ADEQUATE REMEDY AT LAW.

IV. THE DEFENDANT AS FIRST ASSISTANT POSTMASTER GENERAL WAS AUTHORIZED BY THE CONTRACT TO DO THE THING COMPLAINED OF, NAMELY, DISCONTINUE THE USE OF PLAINTIFF'S AUTOMOBILES.

FIRST POINT.

THE CASE IS MOOT.

The sole object of the suit was to enjoin Mr. Roper as First Assistant Postmaster General from causing the Post Office Department to discontinue the use of plaintiff's equipment during the term of the contract.

The courts below, however, refused the injunction, and the term of the contract has now expired—it

was for four years, ending February 11, 1917. (*Supra*, p. 2.)

Therefore, even though this court upon an examination of the record should find itself in disagreement with the grounds on which the courts below dismissed the bill, the only relief sought has become impossible of application by lapse of time. "The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances there is nothing but a moot case."[1] *Richardson* v. *McChesney*, 218 U. S. 487, 492.

Moreover, according to plaintiff's theory, he is not suing the United States or the Post Office Department but Mr. Roper personally, to enjoin him from interfering "by the unlawful and wrongful exercise of his office as First Assistant Postmaster General" with the execution of plaintiff's contract with the United States. (R. 4.) Mr. Roper, however, is no longer First Assistant Postmaster General, and hence can no longer interfere with any right of plaintiff's by the unlawful and wrongful exercise of that office. For that reason also the case is moot. *Richardson* v. *McChesney*, 218 U. S. 487, 492–493; *Codlin* v. *Kohlhausen*, 181 U. S. 151, 152.

[1] The principle that a defendant in an injunction suit proceeds at his peril if he persists in the acts sought to be enjoined, and will be compelled, if the decision is ultimately against him, either to undo what he has wrongfully done or to answer in damages (*Wingert* v. *First National Bank*, 223 U. S., 670, 672), can not be made use of to transmute into a demand for damages a suit against a public officer the whole object of which was to enjoin him from doing a particular act in the exercise of his office. *Mills* v. *Green*, 159 U. S., 651, 653, 657.

Second Point.

THE SUIT IS ONE AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED.

While the United States is not formally named as a party, the direct effect of granting the relief prayed in the bill would have been, as held by both courts below (R. 19, 34), to compel specific performance by the United States of a contract between it and plaintiff. This makes the suit one against the United States. *Louisiana* v. *McAdoo*, 234 U. S. 627, 628-629; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Pennoyer v. McConnaughy*, 140 U. S. 1, 9-10; *In re Ayers*, 123 U. S. 443, 502-503; *Hagood* v. *Southern*, 117 U. S. 52, 67, 69-70; *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446, 457.

The attempt to get around this bar to the suit by treating the First Assistant Postmaster General as an interloper, wrongfully interfering between the United States and the plaintiff with the due performance of a contract which both parties desired to have performed, is fanciful.

The contract was entered into on the part of the United States through the Postmaster General. It expressly provided "that all acts done by the First Assistant Postmaster General in respect of this contract shall be deemed and taken, for all purposes, to be the acts of the Postmaster General." (R. 9.)

The act of the First Assistant Postmaster General in giving notice under section 3 of the discontinuance of the use of plaintiff's equipment was therefore the act of the Post Office Department—of the United

States. Through whom could the United States have acted if not through the Postmaster General or the First Assistant Postmaster General—both of whom for the purposes of this contract stood on the same footing?

If the contention of plaintiff were accepted it would follow that the United States, although claiming the right under the contract to discontinue the use of plaintiff's equipment upon 90 days notice, was nevertheless powerless to exercise that right because any agent through whom it might attempt to do so could be enjoined as a trespasser.

The cases cited by the plaintiff holding that public officers tortiously acting outside the scope of their authority or in pursuance of an unconstitutional statute may be enjoined have no application to the present situation, as the courts below pointed out. (R. 18–19, 34.)

Here the First Assistant Postmaster General in dealing with a contract relating to the affairs of the Post Office Department was acting within the scope of his office. He was authorized to deal with it by virtue of his office and by a provision in the contract itself. Even if it were true that he had erroneously interpreted the contract he would none the less have been dealing with a subject within the scope of his office.

The suit being thus one against the United States it only remains to note that it does not fall within any of the strictly limited classes of cases in which the United States has consented to be sued. (Jurisdiction, District Courts, U. S. Comp. Stats., 1916,

sec. 991, Vol. 1, pp. 553, 817; Judicial Code, sec. 24, par. 20. Jurisdiction, Court of Claims, U. S. Comp. Stats., 1916, sec. 1136, Vol. 2, p. 1468; Judicial Code, sec. 145, par. 1.) Nor is any claim made to the contrary.

In *United States* v. *Jones*, 131 U. S. 1, it was expressly held that the United States did not by the Act of March 3, 1887, 24 Stat. 505, c. 359, which is the present law on the subject, give its consent to be sued for specific performance. See also *District of Columbia* v. *Barnes*, 197 U. S. 146, 151–152.

Third Point.

IN NO EVENT IS THIS A SUIT WITHIN THE EQUITY JURISDICTION, THERE BEING A PLAIN AND ADEQUATE REMEDY AT LAW.

But even had the United States given its consent to be sued for specific performance of its contracts in cases where that remedy would ordinarily lie, the plaintiff's case would not be helped because he has an adequate remedy outside the equity jurisdiction.

Under the Act of March 3, 1887, *supra*, suit may be brought against the United States in the Court of Claims on—

> all claims founded upon * * * any contract * * * with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, * * *. Judicial Code, sec. 145.

When such claims do not exceed $10,000, the same remedy may he had in the District Courts of the

United States. Judicial Code, sec. 24, as amended, Act, December 21, 1911, c. 5.

Assuming that the discontinuance of the use of plaintiff's automobiles was a breach of contract, there would be no greater difficulty than in the ordinary run of cases in measuring the damages in money.

Various collateral elements of damage were alleged in the bill, as loss of credit, injury to plaintiff's grocery business, etc., and plaintiff urges that as these exceed the measure of damages at law, an injunction is the appropriate remedy. The allegations are evidently framed with a view to bringing the case within the decision in *Watson* v. *Sutherland*, 72 U. S. 74 (opinion of the trial court, R. 20). In that case an injunction was issued to restrain the unlawful levying of writs of *fieri facias* on goods not belonging to the judgment debtor. As the goods were the stock in trade in a retail dry-goods business, their wrongful removal would have destroyed the owner's business and the scant measure of damages for the value of the goods would not have compensated him. Obviously the present case is entirely different. The fact that the plaintiff here had a grocery business has nothing to do with the contract between him and the Government or with the performance of it.

It is also said that the remedy in the Court of Claims is not adequate, because judgments of that Court require for their performance appropriations of public money which Congress may grant or refuse in its discretion. It is sufficient to say that this suggestion is based on the assumption that the United

States after consenting to be sued in certain classes of cases would then break faith by refusing to pay the judgments rendered against it.

Again, it is said that a suit in the Court of Claims is not a remedy *at law* in the strict sense of common law jurisprudence. The logic of this contention, as pointed out by the trial court, would lead to the conclusion that an injunction to restrain a breach of contract or to require specific performance would lie even though admittedly the judgment of the Court of Claims would afford full compensation for any damages sustained.

Fourth Point.

THE DEFENDANT AS FIRST ASSISTANT POSTMASTER GENERAL WAS AUTHORIZED BY THE CONTRACT TO DO THE THING COMPLAINED OF, NAMELY, DISCONTINUE THE USE OF PLAINTIFF'S AUTOMOBILES.

Passing to the merits, the right to discontinue the use of plaintiff's automobiles was reserved to the Post Office Department in language free from doubt or qualification:

> The said party of the second part [the plaintiff Wells] hereby consents and agrees that any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part [the United States]. (Contract, paragraph 3, R., 7.)

This provision was evidently intended to save the Government from being tied by a contractual obligation to use a particular equipment or kind of equip-

ment in the event that it should develop later that some other arrangement was better for the Postal Service. In entering into such a contract the plaintiff did no more than assume with his eyes open the ordinary business risk, for a valuable consideration, of undertaking to supply a service which was subject to termination when no longer wanted.

Plaintiff contends that notwithstanding its plain words to the contrary, paragraph 3 contemplated a discontinuance of the use of the automobiles only for cause, that is, for some default or delinquency, being intended as a means of safeguarding the Government against dilapidated equipment. (Appellant's Br., p. 21.)

This construction, besides reading something into the paragraph which is not there, is unreasonable because the contract contains other and much more appropriate provisions for the protection of the Government against the consequences of defaults and delinquencies on the part of the plaintiff. Thus the plaintiff's compensation could be withheld if the Postmaster General were satisfied that he was not complying with the contract; fines could be imposed by the Postmaster General for delinquencies; and for repeated failures or delinquencies the contract could be annulled. (Paragraphs 10, 11, 12, R., 7–8.)

Plaintiff especially urges that because the contract specified certain grounds for annulment (paragraphs 11, 14, R., 7–8), therefore it is not to be supposed that paragraph 3, empowering the Postmaster General "to discontinue equipment," was intended to

authorize him to discontinue the equipment except for the specified causes, since otherwise the Postmaster General could in effect annul the contract without any default on the part of plaintiff. Rather, we say, the fact that specific grounds of annulment for cause are elsewhere enumerated in the contract shows that paragraph 3 has reference to something else. The right to annul for defaults of plaintiff was entirely dissociated from the other right, reserved by paragraph 3, to discontinue the use of his automobiles. The one was contingent on the happening of defaults; the other depended solely on the internal exigencies of the Post Office Department. The two provisions served different purposes and there was no incompatibility between them.

CONCLUSION.

The decrees of the courts below should be affirmed.

G. CARROLL TODD,
Assistant to the Attorney General.

December, 1917.

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